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AMENDED IN ASSEMBLY JANUARY 11, 2006
AMENDED IN ASSEMBLY MAY 2, 2005
CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1302

Introduced by Assembly Member Jerome Horton
(~~Coauthor: Senator Alquist~~)

February 22, 2005

An act to amend ~~Section 11340.5 of, and to add Section 11342.620~~
Sections 11346.1 and 11349.6 of, and to add Section 11342.545 to, the
Government Code, relating to state agencies.

LEGISLATIVE COUNSEL'S DIGEST

AB 1302, as amended, Jerome Horton. Office of Administrative Law: regulations.

Existing law provides that, if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal. Under existing law, a regulation, amendment, or order of repeal adopted as an emergency regulation remains in effect no more than 120 days unless the adopting agency complies with certain requirements.

This bill would require an agency that is adopting an emergency regulation to mail at least 5 working days prior to submission of an emergency regulation to the office a notice of proposed emergency action to every person who has filed a request for notice of regulatory action with the agency unless the emergency situation clearly poses

such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest. The bill would extend to 180 days the maximum period of time a regulation, amendment, or order of repeal initially adopted as an emergency regulation would remain in effect. The bill would authorize the office to approve one readoption of an emergency regulation for a period not to exceed 90 days, as specified. The bill would require the office, after posting a notice of the filing of a proposed regulation on its Internet Web site, to allow interested persons 5 calendar days to submit comments on the proposed emergency regulations unless delaying action to allow public comment would be inconsistent with the public interest.

~~Existing law prohibits a state agency from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, unless it has been adopted as a regulation and filed with the Secretary of State. Under existing law, if the Office of Administrative Law is notified, or learns on its own, that an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has not been adopted as a regulation and filed with the Secretary of State, the office may issue a determination as to whether it is a regulation.~~

~~This bill would provide that any guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure that is a regulation but is not adopted as a regulation and filed with the Secretary of State constitutes an “underground regulation” and would establish a procedure for any interested person with information that a state agency has issued, used, enforced, or attempted to enforce an underground regulation to petition the Office of Administrative Law for a determination that this agency action is an invalid underground regulation. It would require the office, within 30 days after receiving a petition, to accept or reject the petition and would make this decision not subject to judicial review. It also would provide that, if the office accepts the petition, then the office is required, no later than 150 days after public notice of an accepted petition, to determine whether the agency action is an underground regulation and therefore invalid. It also would suspend these requirements connected with a petition if the agency issuing the alleged underground regulation certifies that it will not issue, use, enforce, or attempt to enforce the regulation.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 11342.545 is added to the Government
2 Code, to read:

3 11342.545. For purposes of adopting a regulation pursuant
4 to Section 11346.1, “emergency” means a situation not foreseen
5 in sufficient time to proceed in accordance with the provisions of
6 Article 5 (commencing with Section 11346) that apply to
7 nonemergency regulations and that calls for immediate action to
8 avoid serious harm evidenced by an imminent and substantial
9 threat to the public peace, health, safety, or general welfare.
10 “Emergency” does not mean expediency, convenience, best
11 interest, or general public need, and it cannot be based on
12 speculation.

13 SEC. 2. Section 11346.1 of the Government Code is amended
14 to read:

15 11346.1. (a) (1) The adoption, amendment, or repeal of an
16 emergency regulation is not subject to any provision of this
17 chapter except this section and Section 11349.6.

18 (2) At least five working days before submitting an emergency
19 regulation to the office, the adopting agency shall, except as
20 provided in paragraph (3), mail a notice of the proposed
21 emergency action to every person who has filed a request for
22 notice of regulatory action with the agency. The notice shall
23 describe all of the following:

- 24 (A) The proposed regulatory action.
25 (B) The specific regulatory language proposed to be adopted.
26 (C) The factual and evidentiary basis for the emergency and
27 the need for immediate action.
28 (D) The statutory authority for adopting the regulation.
29 (E) The law being implemented, interpreted, or made specific.
30 (F) The basis for proposing the specific regulation to address
31 the emergency.

32 (3) An agency is not required to provide notice pursuant to
33 paragraph (2) if the emergency situation clearly poses such an
34 immediate, serious harm that delaying action to allow public
35 comment would be inconsistent with the public interest.

(b) (1) Except as provided in subdivision (c), if a state agency makes a finding that the adoption of a regulation or order of repeal is necessary for the immediate preservation of the public peace, health and safety or general welfare, the regulation or order of repeal may be adopted as an emergency regulation or order of repeal.

~~Any~~

(2) Any finding of an emergency shall include a written statement ~~which~~ *that* contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts ~~showing~~ *demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies.* The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

~~The~~

(3) ~~The~~ statement and the regulation or order of repeal shall be filed immediately with the office.

(c) Notwithstanding any other provision of law, no emergency regulation that is a building standard shall be filed, nor shall the building standard be effective, unless the building standard is submitted to the California Building Standards Commission, and is approved and filed pursuant to Sections 18937 and 18938 of the Health and Safety Code.

(d) The emergency regulation or order of repeal shall become effective upon filing or upon any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal.

(e) No regulation, amendment, or order of repeal *initially* adopted as an emergency regulatory action shall remain in effect more than ~~120~~ 180 days unless the adopting agency has complied with Sections 11346.2 to 11347.3, inclusive, either before adopting an emergency regulation or within the ~~120-day~~ 180-day period. The adopting agency, prior to the expiration of the ~~120-day~~ 180-day period, shall transmit to the office for filing

1 with the Secretary of State the adopted regulation, amendment, or
2 order of repeal, the rulemaking file, and a certification that
3 Sections 11346.2 to 11347.3, inclusive, were complied with
4 either before the emergency regulation was adopted or within the
5 ~~120-day~~ ~~120-day~~ 180-day period.

6 (f) ~~In the event~~ If an emergency amendment or order of repeal
7 is filed and the adopting agency fails to comply with subdivision
8 (e), the regulation as it existed prior to the emergency
9 amendment or order of repeal shall thereupon become effective
10 and after notice to the adopting agency by the office shall be
11 reprinted in the California Code of Regulations.

12 (g) ~~In the event~~ If a regulation is originally adopted and filed
13 as an emergency and the adopting agency fails to comply with
14 subdivision (e), this failure shall constitute a repeal ~~thereof of the~~
15 *regulation* and after notice to the adopting agency by the office,
16 shall be deleted.

17 (h) The office shall not file an emergency regulation with the
18 Secretary of State if the emergency regulation is the same as or
19 substantially equivalent to an emergency regulation previously
20 adopted by that agency, unless the ~~director~~ *office* expressly
21 approves the agency's readoption of the emergency regulation.
22 *The office may approve one readoption of the emergency*
23 *regulation for a period not to exceed 90 days if the agency has*
24 *made substantial progress and proceeded with diligence to*
25 *comply with subdivision (e).*

26 SEC. 3. Section 11349.6 of the Government Code is amended
27 to read:

28 11349.6. (a) ~~In the event~~ If the adopting agency has complied
29 with Sections 11346.2 to 11347.3, inclusive, prior to the adoption
30 of the regulation as an emergency, the office shall approve or
31 disapprove the regulation in accordance with this article.

32 (b) Emergency regulations adopted pursuant to subdivision (b)
33 of Section 11346.1 shall be reviewed by the office within 10
34 calendar days after their submittal to the office. *After posting a*
35 *notice of the filing of a proposed emergency regulation on its*
36 *Internet Web site, the office shall allow interested persons five*
37 *calendar days to submit comments on the proposed emergency*
38 *regulations unless the emergency situation clearly poses such an*
39 *immediate serious harm that delaying action to allow public*
40 *comment would be inconsistent with the public interest. The*

1 office shall not file the emergency regulations with the Secretary
2 of State if it determines that the regulation is not necessary for
3 the immediate preservation of the public peace, health and safety,
4 or general welfare, or if it determines that the regulation fails to
5 meet the standards set forth in Section 11349.1, or if it
6 determines the agency failed to comply with subdivisions (b) and
7 (c) of Section 11346.1.

8 (c) If the office considers any information not submitted to it
9 by the rulemaking agency when determining whether to file
10 emergency regulations, the office shall provide the rulemaking
11 agency with an opportunity to rebut or comment upon that
12 information.

13 (d) Within 30 working days of the filing of a certificate of
14 compliance, the office shall review the regulation and hearing
15 record and approve or order the repeal of an emergency
16 regulation if it determines that the regulation fails to meet the
17 standards set forth in Section 11349.1, or if it determines that the
18 agency failed to comply with this chapter.

19 ~~SECTION 1. Section 11340.5 of the Government Code is~~
20 ~~amended to read:~~

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23 **All matter omitted in this version of the bill**
24 **appears in the bill as amended in the**
25 **Assembly, January 11, 2006. (JR11)**
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